No. 92-1262

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MELBA J. BURRELL,

Petitioner,

v.

THE BOARD OF TRUSTEES OF GEORGIA MILITARY COLLEGE; James E. Baugh, individually and in his official capacities as Mayor of the City of Milledgeville, Georgia and Chairman of the Board of Trustees of Georgia Military College; Jacob L. Goldstein, individually and in his official capacities as a member of the Board of Directors of First Federal Savings and Loan Association of Milledgeville and as a member of the Board of Trustees of Georgia Military College; Alva L. Baggarly, individually and in his official capacities as Chief Executive Officer, president and member of the Board of Directors of First Federal Savings and Loan Association of Milledgeville; The First Federal Savings and Loan Association of Milledgeville; The Mayor and Aldermen of the City of Milledgeville; and Unknown Co-Conspirators,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE GOVERNMENT OFFICIAL RESPONDENTS JAMES E. BAUGH AND JACOB L. GOLDSTEIN IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained Respondent local government officials' qualified immunity defense after concluding that there was no factual basis for a finding that they had conspired with Petitioner's private employer to have her terminated and therefore that they could not have committed a constitutional violation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10-37) is reported at 970 F.2d 785. The order of the district court denying Respondents' motion for summary judgment is unreported but appears at (Pet. App. 5-9). An earlier opinion of the district court denying Respondents' motion to dismiss is reported at 696 F.Supp. 1522.

JURISDICTION

The court of appeals denied Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc, on October 29, 1992 (Pet. App. 38-40). The Petition for A Writ of Certiorari was filed on January 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents, without seeking to restate the facts or course of proceedings below, supplement the Petitioner's statement of facts simply to identify Respondents and other parties material to a consideration of the question presented.

Respondent James E. Baugh is the Mayor of the City of Milledgeville, Georgia and is Chairman of the Board of Trustees of Georgia Military College. *Burrell v. The Bd. of Trustees of Ga. Military College, et al.*, 970 F.2d 785, 786 (Pet. App. 11). Respondent Jacob L. Goldstein is a member of the Board of Trustees of Georgia Military College. *Id.*

Alva L. Baggarly was Chief Executive Officer, President, and a member of the Board of Directors of First Federal Savings and Loan Association of Milledgeville, a private banking association. *Id.* Baggarly fired Burrell on April 21, 1988. *Burrell, supra*, 970 F.2d at 792 (Pet. App. 25). Petitioner alleged that she was fired from her job as First Federal's Senior Vice President as a result of a conspiracy, the object of which she contends was to discharge her from her private employment with First Federal in retaliation for her and her husband's public

criticism of Georgia Military College. *Burrell, supra,* 970 F.2d at 786, 787. (Pet. App. 11-13).

ARGUMENT

Although the Petition sets forth two enumerated questions presented, the supporting argument rests on the single contention that "Respondents could not have been acting within the sphere of their official discretionary responsibilities when they allegedly conspired to have Petitioner discharged from her private sector employment in retaliation for her exercise of protected speech." (Pet. App. 6). Observing that government officials may claim qualified immunity only with respect to discretionary functions, Petitioner asserts that the Respondents "did not make, and could not have made, any showing that their official discretionary duties, as members of the board of a public educational institution or as a mayor of a city, included playing any part whatsoever in a private lending institution's decision to discharge one of its employees." (Pet. App. 8).

Certiorari should not be granted on this issue for several related reasons. First, although the court of appeals viewed its interlocutory jurisdiction as limited to reviewing the denial of Respondents' motion for summary judgment on the defense of qualified immunity, *Burrell, supra,* 970 F.2d at 789, n.9, 793, n.18 (Pet. App. 18, n.9 and 28, n.18), its particular reason for upholding qualified immunity targeted the prima facie case. The court's decision turned entirely on Petitioner's failure after full discovery to develop facts of record sufficient to

warrant a trial on the existence of a conspiracy between Respondent government officials and her own private employer and hence on the impossibility of demonstrating a constitutional violation. As Petitioner argues, (Pet. App. 6-7), the "discretionary functions" issue on which certiorari is sought is at most a prerequisite to the affirmative defense[1] of qualified immunity; it does not relate to the sufficiency of her prima facie claim or the conspiracy element of that claim which the court of appeals found fatally defective. Accordingly, a ruling by this Court about the "discretionary functions" aspect of qualified immunity would in the end have no bearing on the outcome of the Section 1983 claims against the Respondents and would therefore be wholly advisory.

That the court of appeals' decision turned in substance on the deficiency of the prima facie claim rather than on any view about a "discretionary functions" precondition to the qualified immunity defense appears

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[1] The Court has consistently viewed qualified immunity as an affirmative defense which, if sustained, may relieve the government official defendant of the burdens of discovery, trial, or both. *See Gomez v. Toledo*, 446 U.S. 635 (1980); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Siegert v. Gilley*, ___ U.S. ___, 111 S.Ct. 1789, 1793 (1991). *See also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 1993 WL 52174 (U.S. March 3, 1993). Of course a defendant ultimately has no need to rely on such a defense if it can earlier conclusively demonstrate the Plaintiff's inability to prevail on an indispensable element of the prima facie claim. This is what happens when, as required by *Siegert*, a court, in initially analyzing the qualified immunity defense to a claim under Section 1983, concludes that the plaintiff has failed to allege or present a triable issue of fact concerning the violation of a cognizable constitutional right.

quite plainly from the face of its opinion: "Our conclusion that Baugh and Goldstein are entitled to qualified immunity . . . turns solely on the absence of facts inferable from the record that support the allegation that Baugh and Goldstein violated any constitutional right. . . . " *Burrell, supra,* 970 F.2d at 793 (Pet. App. 28). As the court explained, "[T]he record does not contain inferable facts that could support a finding that either Baugh or Goldstein in any way conspired with Baggarly to discharge [Petitioner] . . . for her public criticism of GMC. Without a conspiracy there obviously is no constitutional violation. Without a constitutional violation, there can be no violation of a clearly established constitutional right." *Burrell, supra,* 970 F.2d at 792 (Pet. App. 26). In other words, the court avoided the threshold qualified immunity question of whether the right allegedly violated was clearly established by determining at the outset that, absent a conspiracy, there could be no constitutional violation of any kind here, and in turn no triable prima facie case. Its resolution of those issues in that order was obedient to the mandate of *Siegert v. Gilley,* ___ U.S. ___, 111 S.Ct. 1789, 1793 (1991), which the court cited after the last quoted sentence from its opinion.

Because the court of appeals in the ordinary course of resolving the qualified immunity question ultimately concluded that there was a fatal deficiency in Petitioner's prima facie case, it is immaterial that it conducted its analysis on the assumption that Respondents could otherwise claim qualified immunity. Indeed the fact that the court of appeals simply "assumed for purposes of this appeal" that Respondents "are government officials for qualified immunity purposes" (Pet. App. 20) further

underscores why this case is an inappropriate vehicle for raising a question about the contours of the discretionary functions prerequisite to qualified immunity. Neither opinion below addresses this issue. Petitioner admits as much in asserting that the court of appeals' decision "made absolutely no inquiry into whether the alleged unconstitutional acts of Respondents . . . were within the sphere of their official discretionary responsibilities."[2]

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[2] Petitioner is correct that the court of appeals did not discuss a discretionary functions requirement to invoking qualified immunity. Absent any discussion of the issue in the court's opinion, it is difficult to understand the basis of Petitioner's speculation (Pet. App. 10) that the decision "will serve as persuasive authority in other circuits for government officials seeking to invoke qualified immunity in cases where their actions are undisputably not within the sphere of official discretionary duties."

It is not at all clear, however, that, as Petitioner argues (Pet. App. 10), the court of appeals "simply ignored" the discretionary duties issue. In another part of the opinion in which it prohibited private defendants like Petitioner's employer from asserting qualified immunity, the court observed that the defense "serves to give public officials the peace of mind required for their day-to-day discretionary decisions. Accordingly, it shields the public official from liability for wrong discretionary calls. . . . " *Burrell, supra,* 970 F.2d at 796 (Pet. App. 36). Thus although the court was evidently aware of the discretionary functions issue, it nevertheless simply "assumed for purposes of this appeal" that Respondents could invoke qualified immunity (Pet. App. 20), evidently understanding that the deficiencies in Petitioner's prima facie case were dispositive in any event. As the court observed, its decision for Respondents turned " . . . solely on the absence of facts inferable from the record that support the allegation that Baugh and Goldstein violated any constitutional right, however complex." *Burrell, supra,* 970 F.2d at 793 (Pet. App. 28).

(Pet. App. 7). Far from identifying any conflict in the views of the circuit courts on this issue (*See* SCR 10.1.(a)), Petitioner cites not a single lower court opinion elaborating on this Court's observation in *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982), that "Immunity generally is available only to officials performing discretionary functions." *See* Pet. App. at 6-7.

This case is an especially inapt vehicle for the Court's reconsideration of the meaning of that requirement because there is a distinct deficiency in Petitioner's prima facie case (i.e., apart from the absence of a triable issue of conspiracy) that should similarly doom this litigation irrespective of the discretionary functions issue. Petitioner asserts that Respondents' alleged conspiracy with Petitioner's private employer had "*nothing* whatsoever to do with official discretionary duties." (Pet. App. 9 *emphasis in original*). She explains that Respondents "did not make, and could not have made, any showing that their official discretionary duties, as members of the board of a public educational institution or as a mayor of the city, included playing any part whatsoever in a private lending institution's decision to discharge one of its employees." This argument simply fuels the "serious doubts" expressed by the court of appeals (*Burrell, supra*, 970 F.2d. at 790, n.12, Pet. App. 20) whether Petitioner can show "state action under the First and Fourteenth Amendments" or "action under color of state law for Section 1983 purposes, even assuming counterfactually that . . . [she] had managed to fill the record with inferable facts supporting a finding that Baugh, Goldstein and Baggarly conspired to have [her] fired." Lack of state action would be just as conclusive and independent a

prima facie barrier to Petitioner's claim as the lack of a triable case of conspiracy already found by the court of appeals; either conclusion would render wholly advisory an opinion by this Court about the prerequisites to the affirmative defense of qualified immunity.

CONCLUSION

The Petition for Writ of Certiorari should be denied. Respectfully submitted this 11th day of March, 1993.

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